

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAHIL GIBRON HADDEN,

Defendant-Appellant.

UNPUBLISHED
February 20, 2007

No. 264766
Washtenaw Circuit Court
LC No. 04-001851-FH

Before: Whitbeck, C.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Defendant Kahil Hadden appeals as of right his jury convictions for three counts of delivery of a controlled substance within 1000 feet of school property.¹ The trial court sentenced Hadden to three consecutive sentences of 2 to 120 years' imprisonment. We affirm.

I. Basic Facts And Procedural History

On July 20, 2004, Detective Tamika Singleton of the Washtenaw County Sheriff's Department called Hadden and arranged a drug buy. The buy took place at a gas station located at 1166 Ecorse Road in Ypsilanti Township and Hadden sold Detective Singleton \$120 worth of crack cocaine. A few weeks later, Detective Singleton contacted Hadden to arrange another drug buy. They agreed to meet at the same gas station, and Hadden sold the detective \$150 worth of cocaine. On September 1, 2004, Detective Singleton arranged a third drug buy with Hadden. This time, Hadden told the detective to meet him at the intersection of Hamilton and Harriet streets. Detective Singleton met Hadden at Biggie's Restaurant where he sold her \$150 worth of crack cocaine.

Before trial, Hadden moved to quash the Information or hold an evidentiary hearing on the issue of entrapment. At the motion hearing, Hadden argued that he was entrapped because Detective Singleton purposely selected buy locations within 1000 feet of school property so as to enhance his punishment. After defense counsel made his opening statement, the prosecutor

¹ MCL 333.7401(2)(a)(iv); MCL 333.7410(2).

sought to clarify whether defense counsel was willing to have the trial court decide this issue based on the preliminary examination transcript, to which defense counsel replied:

I don't see a need to have a preliminary—anything other than a preliminary exam to decide this. I mean we went into this thing in quite detail [sic] at the preliminary exam and she clearly states that—and we clearly stated our defense within there. Obviously, you know the Court can do as it pleases and if it chooses to follow the Prosecutor's argument, then I obviously can't say anything about that.

Based on defense counsel's assertion and the fact that no evidence was in dispute, the trial court decided to deny any request for an evidentiary hearing. The trial court also denied Hadden's motion to quash, finding that he was not entrapped because he was merely presented with the opportunity to commit a crime.

At trial, the prosecution presented testimony from Detective Singleton recounting the drug buys, the officers who delivered the drugs to the State Police crime lab, and the State Police crime lab scientists who conducted tests and concluded that Hadden had sold the detective crack and cocaine. The prosecution also admitted maps establishing that Hadden sold the drugs within 1000 feet of school property. Hadden attempted to impeach Detective Singleton's credibility and discredit the State Police crime lab's results confirming that the substances he sold to the detective were crack and cocaine. During closing arguments, defense counsel argued that Detective Singleton lied and that her testimony was incredible because it was uncorroborated and no video or audio recording was available even though the detective wore a wire during the transactions. In response, during his rebuttal closing argument, the prosecutor argued:

But, I think it's – I think it's troubling when somebody makes that type of assertion about lying and there's really no evidence to back that up, ladies and gentlemen. We haven't heard anything to back that up. And, Mr. Collis wants to make a big deal about the wire and not being recorded, not being taped. And, again, I argue that's a red herring, ladies and gentlemen. That's taking away from what the Defendant did.

Defense counsel did not object to these remarks.

After closing arguments, the jury deliberated for approximately an hour before sending out a note containing five questions. The jury asked: 1) to see the drugs; 2) to rehear Detective Singleton's testimony; 3) to view Exhibits 8, 9, 10, 11 and 12, which were the maps documenting the buy locations and the distance to the schools; 4) if school property meant within 1000 feet of the school; and 5) for a definition of entrapment. The trial court allowed the jury access to the drugs and the exhibits. The trial court also instructed the jury to rely on its members' own notes and common sense to reconstruct Detective Singleton's testimony and that school property did include a 1000 foot buffer zone. The trial court heard argument from both attorneys on how to respond to the question about entrapment. The prosecution argued that the jury be instructed that entrapment was a legal question that had already been decided by the court and that it was not to consider entrapment. Defense counsel asked for an instruction reiterating the instruction on credibility and weighing evidence, including a statement that the jury was not

to address entrapment. The trial court gave the instruction proposed by the prosecution but noted Hadden's objection.

The jury deliberated for a few more hours without further interruption and then returned a guilty verdict on all counts. This appeal followed.

II. Entrapment Issues

A. Request For Evidentiary Hearing

Hadden argues that the trial court abused its discretion by denying his motion for an evidentiary hearing on the issue of entrapment. Hadden waived review of this issue by expressly asking the trial court to forgo a separate evidentiary hearing and decide the entrapment issue based on the testimony given at two previous preliminary examination hearings.²

B. Entrapment Itself

(1) Standard Of Review

Hadden argues that the trial court erred by deciding defendant was not entrapped. We address the merits of this argument because the issue was raised and decided in the trial court.³ We review a trial court's finding regarding entrapment for clear error.⁴

(2) Legal Standards

There are two ways that a defendant can be entrapped: "(1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated."⁵

Hadden does not argue that the police induced him to commit a crime that he would not have otherwise committed. Rather, he attempts to invoke the theory of sentencing entrapment and argues that the trial court's ruling that he was not entrapped barred him from arguing for a downward departure from the sentencing guidelines. He seeks a remand for resentencing on this ground. The Michigan Supreme Court has rejected the adoption of sentencing entrapment, ruling instead that a trial court may consider, if it can be objectively and verifiably shown, whether the police conduct or some other precipitating cause altered a defendant's intent.⁶ A defendant's altered intent, then, can be considered by the trial court as a basis for a downward

² *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

³ *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

⁴ *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002).

⁵ *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997).

⁶ *People v Claypool*, 470 Mich 715, 718; 684 NW2d 278 (2004).

departure.⁷ Hadden did not ask the trial court to consider whether his intent was altered by police conduct at sentencing. We fail to see how the trial court's pre-trial ruling that Hadden was not entrapped precluded him from requesting a downward departure from the guidelines based on an "altered intent" theory. At the pre-trial hearing, Hadden was presumably asking the trial court to find that he was entrapped so as to bar prosecution. It does not logically follow that the trial court's pre-trial ruling impeded him from seeking an entirely different remedy at sentencing, where his theory would have been more appropriate in light of the holding in *Claypool*, *supra*. Consequently, no error occurred.

III. Prosecutorial Misconduct

A. Standard Of Review

Hadden argues that he was deprived of a fair trial due to a remark the prosecutor made during closing arguments. Hadden did not object to the remark at trial, thereby failing to preserve this issue.⁸ Appellate review of an unpreserved claim of prosecutorial misconduct is generally barred because the trial court did not have the opportunity to cure the error.⁹ However, a defendant may seek review of improper prosecutorial remarks if a curative instruction could not have eliminated the prejudicial effect of the remarks or the failure to consider the issue would result in a miscarriage of justice.¹⁰ We review unpreserved claims for plain error.¹¹

B. The Prosecutor's Statement

Hadden claims that the prosecutor denigrated defense counsel during his closing argument, which allowed the prosecutor to inject issues broader than Hadden's guilt or innocence into the proceedings. The statement Hadden takes issue with is: "And, again, I argue that's a red herring, ladies and gentlemen. That's taking away from what the defendant did." Hadden has not shown that an appropriate curative instruction would not have mitigated the prejudice, if any, that was caused by the prosecutor's remarks.¹² In addition, Hadden did not offer proof, and the record does not reflect, that he suffered a miscarriage of justice because of the remark.¹³ Indeed, Hadden cannot show a miscarriage of justice where the remark was made in response to an argument that he advanced and the remark merely properly rebutted the logic of defense counsel's argument. Therefore, no plain error occurred.

⁷ *Id.*

⁸ *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

⁹ *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

¹⁰ *Id.*

¹¹ *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

¹² See *Stanaway*, *supra* at 687.

¹³ *Id.*

IV. Ineffective Assistance Of Counsel

A. Standard Of Review

Hadden argues that he was denied the effective assistance of counsel because defense counsel failed to object to the now-challenged prosecutor's remark. Because Hadden failed to preserve this issue for appeal by moving for a new trial or evidentiary hearing in the trial court, our review is limited to errors to that are apparent on the record.¹⁴

B. Futile Objections

The record reveals that the prosecutor's remark was neither improper nor prejudicial to Hadden. Therefore, had defense counsel objected, such an objection would have been futile and meritless. Counsel does not render ineffective assistance by failing to raise futile objections.¹⁵

V. View Of Video

A. Standard Of Review

Hadden also filed a Standard 4 brief¹⁶ containing three additional issues. Hadden first asserts that the trial court abused its discretion by denying the jury's reasonable request to view the video of the police officer that arranged and purchased the controlled substance. Hadden did not object to the trial court's response to the jury's request, nor did defense counsel expressly consent to the trial court's response, as alleged by the prosecution. The failure to object constitutes forfeiture; therefore, this Court reviews for plain error.¹⁷

B. MCR 6.414(J)

MCR 6.414(J) provides that, if the jury requests a review of certain testimony, the trial court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The record here reveals that the trial court instructed the jury to rely on its own notes and common sense "at this time," but it never foreclosed the possibility of the jury hearing the requested testimony. Clearly, this instruction implied that the trial court would have been amenable to the jury viewing the testimony at a later time, if necessary. Thus, the trial court did not commit plain error when it instructed the jury as it did.¹⁸

¹⁴ *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

¹⁵ *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

¹⁶ Administrative Order No. 2004-6 (allowing a defendant to file a brief *in propria persona*, raising issues that the defendant's attorney does not believe are meritorious).

¹⁷ See *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

¹⁸ See *People v Howe*, 392 Mich 670, 677-678; 221 NW2d 350 (1974).

VI. Ineffective Assistance Of Counsel

A. Standard Of Review

Hadden asserts that he was deprived of the effective assistance of counsel when defense counsel failed to object to the trial court's refusal to allow the jury to rehear the officer's testimony. Again, this issue was unpreserved, and we review unpreserved claims of ineffective assistance of counsel for plain error affecting a defendant's rights.¹⁹

B. Futile Objections

As already observed, the trial court properly responded to the jury's request to rehear the officer's testimony. Because the trial court did not abuse its discretion by precluding the jury from rehearing the officer's testimony, an objection made by defense counsel would have been meritless and futile. Counsel does not render ineffective assistance by failing to raise futile objections.²⁰

VII. Substitute Counsel

A. Standard Of Review

Hadden asserts that the trial court abused its discretion by refusing to substitute counsel. Defendant claims that he was entitled to substitute counsel because defense counsel failed to adequately communicate with him and failed to adequately prepare for trial. The decision regarding substitution is within the discretion of the trial court and will not be reversed absent an abuse of that discretion.²¹ A defendant is entitled to the appointment of a substitute counsel only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process.²² Inadequacy, lack of diligence, or disinterest on the part of the lawyer can establish good cause.²³

B. Hadden's Allegations

Hadden alleges that defense counsel never visited him during the "90 or 100 days" that he was in jail awaiting trial, that defense counsel failed to adequately investigate evidentiary inconsistencies relating to Hadden's identification, and that defense counsel failed to otherwise adequately prepare for trial. However, when the trial court prompted Hadden for more specific examples, he was unable to offer evidence of defense counsel's inadequacy. On this record,

¹⁹ *Thomas, supra* at 453-454.

²⁰ *Ackerman, supra* at 455.

²¹ *People v Russell*, 471 Mich 182, 192 n 25; 684 NW2d 745 (2004); *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

²² *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

²³ *People v Flores*, 176 Mich App 610, 613; 440 NW2d 47 (1989).

Hadden failed to demonstrate good cause. Accordingly, the trial court did not abuse its discretion in denying the request for substituted counsel.

Affirmed.

/s/ William C. Whitbeck

/s/ Richard A. Bandstra

/s/ Bill Schuette